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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MARK A. WALTHER, as Trustee,
etc. et al.,

Respondents,

v.

MONICA HUJAZI et al.,

Appellants.

A157508

(San Mateo County
Super. Ct. No. 17PRO00929)

In this combined appeal, Monica Hujazi and her daughter Jacqueline Zuercher appeal an order approving a settlement agreement between Mark Walther, successor trustee of the Monica Hujazi Trust (the Trust), and Janina Hoskins, the Chapter 7 trustee of Monica Hujazi's bankruptcy estate. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Trust was created in 2008, pursuant to the resolution of a dispute regarding the estate of Hujazi's mother. The trust instrument names Debra Dolch (an independent professional fiduciary) as the settlor and Hujazi as the trustee. It specifies that if Hujazi fails to qualify as a trustee, the Borel Private Bank shall act as successor trustee. It also contains provisions regarding the distribution of trust assets to Hujazi's children after her death.

In 2013, an involuntary Chapter 7 bankruptcy petition was filed against Hujazi. Hoskins was appointed the Chapter 7 trustee of Hujazi's bankruptcy estate. In 2015, the bankruptcy court entered an order for relief. Because Hujazi was the subject of an order for relief in bankruptcy, she could no longer serve as trustee of the Trust by operation of law. (Prob. Code, § 15643, subd. (f).)

In September 2017, Dolch initiated the underlying probate proceeding through her petition to appoint a successor trustee to the Trust. Dolch requested continuances of the hearing and amended the petition. The petition was subsequently granted, and Walther was appointed as successor trustee.

In November 2017, Hoskins brought an adversary proceeding in the bankruptcy court on behalf of the bankruptcy estate, naming Hujazi (in her individual capacity and as trustee of the Trust) and Zuercher as defendants. The complaint alleged that the Trust was set up to shield Hujazi's inheritance from her creditors, and that Hoskins should be permitted to reach the trust assets in their entirety, or to the extent lawful and necessary to satisfy Hujazi's debts. When the probate court appointed Walther as successor trustee to the Trust, Hoskins amended her complaint to add Walther (in his capacity as successor trustee) as a defendant in the adversary proceeding.

In October 2018, Walther and Hoskins executed a settlement agreement to resolve the adversary proceeding. The settlement agreement states that the Trust assets included ownership interests in two California limited liability companies (LLCs). Among other things, the settlement agreement provides that 75 percent of those ownership interests be

transferred to Hoskins for the benefit of the bankruptcy estate. It also describes the division of income distributions from the LLCs.

The settlement agreement was, however, contingent on approval by both the bankruptcy court and the probate court. Hoskins filed a motion in the bankruptcy court for an order approving the settlement agreement. No objections were filed. In December 2018, the motion was granted.

One week later, Walther filed a petition for approval of the settlement agreement in the underlying probate proceeding. The petition contended the settlement agreement was in the best interests of the Trust because it reasonably approximated the likelihood of success of the respective parties in the adversary proceeding. On January 23, 2019, Hujazi filed an opposition. The opposition argued that Hujazi was misled into signing the settlement agreement by “Attorney Kass” and that she “was not advised exactly the terms of the Settlement Agreement.” Zuercher did not file an opposition.

At the February 4, 2019 hearing on Walther’s petition, Zuercher appeared and argued that she had not received notice of the decisions affecting her interest in the probate and the bankruptcy proceedings. The probate court continued the hearing to afford Zuercher the opportunity to object.

On February 19, 2019, Zuercher filed an opposition. The opposition argued that Zuercher had “not been served with any documents in Federal or State court, San Mateo County specifically regarding the Settlement Agreement” by “Attorney Kass” and “was not advised of any of the terms of the Settlement Agreement nor how those terms affected my interest.” Zuercher requested “additional time to find competent counsel to represent me in these matters.” Walther and Hoskins filed supplemental briefs arguing that attorney Peter Bonis had been counsel of record for Hujazi and

Zuercher in both the probate proceeding and the adversary proceeding, and accordingly Zuercher was served with documents through Bonis. At the March 20, 2019 hearing, the probate court granted Zuercher's request for an additional continuance.

On April 22, 2019, Hujazi and Zuercher separately filed objections to the settlement agreement. Hujazi objected on the grounds that she was solvent when the Chapter 7 bankruptcy petition was filed, that Walther had violated "numerous terms" in the Trust, and that "intrinsic fraud" prohibited her from objecting to Walther's appointment. Zuercher objected on the grounds that she had "never been served with regard to the settlement agreement or any matters in the bankruptcy court," that she "was not informed of the seizure [of her personal belongings] or given an opportunity to object," and that she "was not informed of any changes in the position of Trustee" for the Trust. The objection states that Zuercher "do[es] not consent to Mark Walthers [*sic*] serving as Trustee." Walther and Hoskins filed supplemental briefs, disputing any violation of the terms of the Trust and again arguing that Zuercher was properly served through Bonis, her counsel of record.

After oral argument on May 6, 2019, the probate court entered an order approving the settlement agreement. It found that notice of the petition for approval had been given as required by law, and that the terms of the settlement agreement were "reasonable" and "for the advantage, benefit, and best interest of the Trust and those interested in it[.]"

Hujazi and Zuercher each filed notices of appeal. The two notices were combined into this one appeal.

DISCUSSION

A probate court's approval of a settlement is reviewed for an abuse of discretion. (*Estate of Green* (1956) 145 Cal.App.2d 25, 28.) "On appeal, we review the probate court's ruling, not its reasons, and affirm if the ruling is correct albeit the reasons are not; we also resolve any ambiguities in favor of affirmance." (*Blech v. Blech* (2018) 25 Cal.App.5th 989, 999.) Appellants bear the burden to establish abuse of discretion. (*In re Marriage of King* (2000) 80 Cal.App.4th 92, 118.) In reviewing the approval of a settlement agreement, we also consider the strong public policy favoring pretrial settlements. (*Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 745.) This policy extends to probate proceedings, in light of "the interest of the preservation of family ties, the adjustment of equities, and avoiding nonproductive waste of the assets of the estate." (*Estate of Schuster* (1984) 163 Cal.App.3d 337, 342.)

Appellants Hujazi and Zuercher argue the probate court should not have approved the settlement agreement for five reasons: (1) Walther had no right to serve as successor trustee because his appointment violated the terms of the Trust; (2) Walther was "derelict" in his duties as trustee because he failed to keep Zuercher informed of his appointment, as well as events in the adversary and probate proceedings; (3) Walther should have been removed as trustee because he was motivated by the opportunity to personally profit from the settlement agreement; (4) Walther entered the settlement agreement because his counsel could not meet the summary judgment opposition deadline and was unprepared for trial in the adversary proceeding; and (5) the settlement agreement was not in the best interest of the Trust because Hujazi "had a very good chance" of prevailing on the merits in the adversary proceeding. We address each argument in turn.

As for appellants' first argument, Walther and Hoskins contend we should not consider it because Hujazi and Zuercher have never taken any action to challenge the February 2018 order appointing Walther as successor trustee, and because appellants fail to provide a sufficient record to evaluate the merits of the contention. Although we agree that appellants' failure to previously challenge Walther's appointment appears problematic, we need not address that issue because we conclude that the deficiency of the record on appeal is dispositive.

Hujazi and Zuercher do not provide an adequate record to explain the circumstances surrounding Walther's appointment: for example, whether Dolch petitioned the probate court for an appointment because the Borel Private Bank declined to serve as successor trustee. In such circumstances, the probate court would have the discretion to appoint a successor trustee. (Prob. Code, § 15660, subd. (d).) Here, the record does not include Dolch's September 2017 petition to appoint a successor trustee, her January 2018 amended petition, or the February 2018 order appointing Walther as successor trustee. These omissions render the record inadequate to review appellants' claim that the probate court abused its discretion by appointing Walther as successor trustee. (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447 [appellants have "an affirmative obligation to provide an adequate record so that we may assess whether the trial court abused its discretion"].)

Moving to appellants' second argument, Walther responds that Zuercher was properly kept apprised of his appointment and the events in the adversary and probate proceedings through Bonis, her counsel of record. Zuercher, however, contends Bonis was not her attorney and did not represent her.

The question of whether an attorney is representing a person involves “questions of fact to be determined by the trial court based upon the conduct of counsel and the evidence before it.” (*Quaglino v. Quaglino* (1979) 88 Cal.App.3d 542, 549 [where incarcerated father was in fact represented by counsel, court did not err in denying his request to be physically present at support and receivership hearing].) Here, the record before the probate court shows that Bonis identified himself as counsel for Zuercher in the adversary proceeding as early as January 2018, when he filed an answer on behalf of Hujazi and Zuercher. Hoskins’s amended complaint in that proceeding, filed in April 2018, included reference to Walther’s appointment. In the adversary proceeding, the notice of electronic filing for Hoskins’s motion to approve the settlement included a proof of service on Bonis. Likewise, in the probate proceeding, the record shows that Bonis identified himself as counsel for Zuercher as early as June 2018, when he appeared on her behalf at a hearing. The proof of service attached to Walther’s petition for approval of settlement included Bonis.

The foregoing documents thus support the probate court’s determination that Zuercher was properly served with filings related to the settlement agreement in both the adversary and probate proceedings through her counsel of record. (Civ. Proc. Code, §§ 465, 1010.) While there may have been some initial delay in notifying Zuercher of Walther’s appointment as successor trustee, the settlement agreement executed by Walther was approved six months after the foregoing filings put Zuercher on notice of his appointment. Appellants offer no authority holding or otherwise suggesting that the circumstances here are sufficient to establish an abuse of discretion. Accordingly, they have not established an abuse of discretion on this basis.

As to appellants’ remaining three arguments, Walther responds they were never raised in the probate proceedings below and are thus forfeited. We agree. These arguments—centering on Walther’s alleged motivation to personally profit, Walther’s alleged inability to meet the summary judgment opposition deadline or prepare for trial, and Hujazi’s perceived likelihood of prevailing on the merits in the adversary proceeding—were not contained in any of appellants’ oppositions or objections to the petition for approval of the settlement agreement, or presented at any of the related hearings before the probate court. “As a general rule, issues or theories not properly raised or presented before the trial court will not be considered on appeal.” (*Vikco Ins. Services, Inc. v. Ohio Indem. Co.* (1999) 70 Cal.App.4th 55, 66–67.) While we do have discretion to consider some issues not properly raised in the trial court if they present a pure question of law on undisputed factual evidence (*id.* at p. 67), such consideration is not appropriate here. There are factual disputes as to whether Walther personally profited from the settlement agreement, whether Walther was unable to meet the summary judgment opposition deadline, and whether and to what degree Hujazi was likely to succeed in the adversary proceeding. Accordingly, we follow the general rule and treat these arguments as forfeited.¹

¹ Walther and Hoskins filed separate requests for judicial notice with their respondent briefs. We deferred ruling on the requests until the merits of the appeal. (See *People v. Preslie* (1977) 70 Cal.App.3d 486, 493–494.) Having now considered the requests, we deny them in full. The requests ask us to take judicial notice of six documents filed in the adversary proceeding. Walther and Hoskins cite these documents to respond to the arguments regarding Walther’s alleged inability to meet the summary judgment opposition deadline and Hujazi’s likelihood of prevailing in the adversary proceeding. In light of our conclusion that these arguments were forfeited, we deny the requests for judicial notice as unnecessary to our decision. (See, e.g., *TransparentGov Novato v. City of Novato* (2019) 34 Cal.App.5th 140, 146 fn. 3.)

DISPOSITION

The order approving the settlement agreement is affirmed.

FUJISAKI, ACTING P.J.

We concur.

PETROU, J.

JACKSON, J.

(A157508)